Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

DAN C. FRISARD PETITIONER, and Creditor

VS.

CYNTHIA TRAINA RESPONDENT, and Trustee

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES FIFTH CIRCUIT COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

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30 pp

QUESTIONS PRESENTED FOR REVIEW

(1) Is a bankruptcy judgment rendered on merits of a separate "judicial unit" consisting of a contested motion to remove trustee brought on a specific set of facts and legal grounds a final judgment subject to immediate review by higher federal courts?

(2) More specifically, did the Honorable Fifth Circuit of Appeals Court err, and are they in conflict with other U.S. Circuits when they affirmed U.S. District Court's opinion that a judgment denying motion to remove trustee is an interlocutory judgment and non-reviewable.

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OPINIONS BELOW

The opinion of the United States Fifth Circuit Court of Appeals appears at Appendix A, the opinion of United States District Court for Eastern District of Louisiana appears at Appendix B, and the judgment of U.S. Bankruptcy Court for Eastern District of Louisiana appears at Appendix C; all said opinions are unpublished at this time, although Petitioner has petitioned Fifth Circuit to publish because there are no guiding cases in Fifth case jurisprudence determinative of a bankruptcy judgment on Motion to Remove Trustee being either final or interlocutory.

JURISDICTION

The date on which the Fifth Circuit Court of Appeals decided my case was February 16, 1998, no petition for rehearing was filed and jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal statutes involved are:

11 U.S.C. Bankruptcy Code - Sections 324 and 704

and are typed verbatim appearing in Appendix E of petition.

STATEMENT OF THE CASE

The extensive bankruptcy of debtor Jo Ann Ulmer was born in March 1989 with filing of her first bankruptcy Chapter 13 - No. 89-00922. That case was soon voluntarily dismissed when the Chapter 13 plan was not confirmed and debtor then filed subsequent multiple, illegal Chapter 7 cases thereafter: Chapter 7 No. 90-10412 in February 1990 and Chapter 7 No. 91-14131 in October 1990, both which were dismissed by Bankruptcy Court as being premature and in violation of Bankruptcy Code Section 109(g)(2). Finally, in November 1991 debtor filed a fourth bankruptcy and the still pending present case, Chapter 7 - No. 91-14743, and Cynthia Traina was appointed trustee. Debtor Ulmer was discharged in the fourth case on March 12, 1992, but case was not closed.

Early in 1994 debtor's fourth case received approximately $60,000.00 in windfall cash assets and creditors were instructed and did file several timely Proofs of Claim. In mid 1995 Trustee Traina, however, decided not to distribute one dollar of the assets to any creditor and filed Bankruptcy Adversary Proceeding No. 95-1190 and similar causes of action a few weeks later in Louisiana's Twenty-Second District Court. Petitioner, Dan C. Frisard, a secured creditor objected to the expenditure of over $20,000.00 in legal fees in just filing said risky offensive litigation. Two years later, when petitioner discovered that the trustee was a co-business tenant with the bankruptcy estate attorney, Claude Lightfoot; that trustee had failed to distribute any assets and close the case after six years of administration, refused to investigate inside creditor claims, and refused to communicate basic financial information (i.e. value of estate,

legal fees, administrative fees) via his certified letters and telephone calls; petitioner filed Motion to Remove Trustee under Bankruptcy Code Section 324, alleging trustee negligence and failure to perform duties pursuant to Section 704.

After a trial on the merits, the Motion to Remove Trustee was denied on February 13, 1997 by Bankruptcy Court and petitioner timely appealed to U.S. District Court. Although petitioner alleged that the bankruptcy court judgment denying the Motion to Remove Trustee was a final judgment on separate "judicial unit", he, out of an abundance of caution, also filed a Motion for Leave alleging irreparable (due to rapid depletion of estate funds) injury if the U.S. District Court alternatively adjudged that the judgment was interlocutory. The U.S. District Court did opinion on May 29, 1997 that the denial of the Motion to Remove Trustee was not a final judgment, but interlocutory, non-reviewable, and also that petitioner failed to state valid irreparable injury. Petitioner filed a timely appeal to the U.S. Fifth Circuit Court of Appeals, who on February 16, 1998 affirmed District Court's opinion that Bankruptcy Court's judgment was not final, but interlocutory, and therefore non-reviewable by the Fifth Circuit. Petitioner has now filed a timely Application for Writs of Certiorari herein to this Honorable Court.

REASONS FOR GRANTING THE PETITION

Pursuant to Rule 10 of this Honorable Court, Petitioner and Relator respectfully avers that a Writ of Certiorari should be granted because the United States Fifth Circuit Court of Appeals has entered a judgment with an opinion; (a) in conflict with previous judgment's and opinions of a majority of the other U.S. Circuit Courts of

Appeal on the same issues; (b) adverse to the universally accepted principle that all federal judgments, especially those of Bankruptcy Court, which resolve specific causes of action or "judicial units" on the merits are final judgments subject to immediate review by higher courts before the end of the bankruptcy case, and finally; (c) adverse to the very intent and spirit of the U.S. Congress which to protect the financial interests of all debtors and creditors provided specific statutes to immediately remove a negligent or dishonest trustee prior to the closure of any bankruptcy case before more financial injury was done to bankruptcy estate.

ARGUMENT

FIFTH CIRCUIT JUDGMENT/OPINION IS IN CONFLICT WITH MAJORITY OF OTHER U.S. APPELLATE CIRCUITS

The Fifth Circuit judgment and opinion affirming the lower U.S. District Court's opinion that Bankruptcy Court's denial of a contested Motion to Remove Trustee is interlocutory and not a final appealable judgment is in direct conflict with several, if not a majority of the other U.S. Appellate Circuits. Some Circuits have consistently as early as 1904 reviewed bankruptcy decisions regarding motions to remove trustee, throughout the changing history of bankruptcy legislation and statutes, and continue to do so currently. *In Re Wrisley Co.*, 133 Fed. Rep., 388 (7th Cir. 1904). In *Wrisley* case an aggrieved creditor filed a petition which among other issues was to remove trustee for fiduciary misconduct and U.S. District Court, sitting in bankruptcy, denied such petition and Seventh Circuit granted review prior to closure of bankruptcy case without question of jurisdiction being raised. Later in *In re Woodmar Realty Company*, 294

F.2d 785 (7th Cir. 1961) the Seventh reviewed a petition to remove a trustee filed and denied in Bankruptcy Court and reviewed by District Court for the Southern District of Illinois, again without either reviewing courts raising objection of finality or jurisdictional questions of review. Then *In Matter of Kilgus*, 811 F.2d 1112 (7th Cir. 1987) the Seventh set forth their most recent common sense policy of finality and appealability of bankruptcy court judgments at page 1116:

> "The additional category of bankruptcy orders treated as final for purposes of 28 U.S.C. Section 158(d), includes many that would not be immediately appealable in ordinary civil cases. We tolerate these appeals in part because of the need to tie up the many subsidiary matters that litter the road to the distribution of assets in bankruptcy. A court cannot wait until the end of the case to allow the appeal, because final disposition in bankruptcy (the plan, distribution and discharge) depends on prior authoritative disposition of subsidiary disputes."

Most recently the Seventh reviewed a Bankruptcy Court denial for a Motion for Removal of a Chapter 7 Trustee *Matter of Schultz Mfg. Fabricating Co.*, 956 F.2d 686 (7th Cir. 1992) and even reviewed the individual grounds for removal. Id at 691-692.

The Second Circuit has as early as 1934 indicated it also holds a liberal policy to review bankruptcy court decisions on removal of trustee motions, holding that such judgments are "final" judgments and without objection as to their jurisdiction to review. *In re National Public Service*

Corp., 68 F.2d 859 (2nd Cir. 1934). Many years later the Second ruled upon a distinguishing case, *In the Matter of Freeport Italian Bakery, Inc.*, 340 F.2d 50 (2nd Cir. 1965), in which they not only reversed the U.S. District Court for the Eastern District of New York's affirmation of a lower bankruptcy court's denial of Motion to Remove Trustee, but stated at page 51: "...ancillary to removal of trustee, to vacate all orders allowing and rejecting claims, and would exercise that power, thus wiping slate clean for a new trustee to take over." This *Freeport* opinion illustrates why it is important for higher court to review bankruptcy judgments on trustee removal motions, for if trustee is alleged of fiduciary misconduct or negligence of administrative duty, the longer the trustee is allowed to mismanage the bankruptcy case the more bankruptcy subsidiary orders will have to be later vacated and the bankruptcy case virtually begun all over again with new trustee. Petitioner's Motion to Remove Trustee Traina similarly alleged fiduciary mismanagement of the bankruptcy estate.

Later *In re Arlan's Department Stores, Inc.*, 615 F.2d 925 (2nd Cir. 1979) the Second Circuit reviewed the judgment of lower District Court and bankruptcy court concerning the removal of a trustee due to breach of trustee's duty to disclose potential conflicts of interest with trustee's personally chosen bankruptcy estate counsel (i.e. another ground for removal raised in Petitioner's Motion to Remove Trustee Traina). Following the lead of the Second, the lower U.S. District Courts in the circuit therein have since consistently viewed bankruptcy judgments on motion to remove a trustee to be final judgments under 28 U.S.C. 158(a) and immediately reviewable. *Matter of REA Holding Corp.*, 2 B.R. 733(1980).

The Fourth Circuit, however, has recently rendered the most distinguishing case regarding the finality and immediate appealability of bankruptcy judgments on trustee removal actions. *Turchen v. Chapman*, 823 F.2d 836 (4th Cir. 1987). The *Turchen* case firmly established that a bankruptcy "decision in proceeding to removed trustee, that trustee had not violated fiduciary duties by failing to collect on note, constituted 'final decision'". Id pages 836, 839. The Fourth in same decision cited the preceding distinguishing cases *In re Charter Co.*, 778 F.2d 617, 621 (11th Cir. 1985) and *In re Leimer*, 724 F.2d 744, 745 (8th Cir. 1984). Importantly, *Turchen* also opinioned that the fiduciary misconduct grounds originally alleged could not be re-litigated (due to res judicata and preclusive effect) and that bankruptcy court decisions which revolve particular adversary proceedings are "final decisions even though they do not dispose of bankruptcy case". Id at pages 839-840. Similarly, Petitioner avers his bankruptcy motion was based primarily on allegations that trustee Traina failed to perform her fiduciary duty as required by Bankruptcy Code Section 704. Petitioner therefore avers that *Turchen* case is totally supportive and guiding in his arguments previously made in appeal before U.S. District Court for the Eastern District of Louisiana and Fifth Circuit, particularly that: (1) his Motion to Remove Trustee was a single "judicial unit" based on a very particular set of facts of misconduct and particular violations of Section 704 and bankruptcy courts's denial on those merits is a final, appealable and reviewable judgment, and (2) such final judgment is res judicata and has a preclusive effect on petitioner bringing another motion based on those same facts and alleged violations of misconduct. Id *Turchen* pages 836, 839. In *Turchen* trial court appropriately applied the principle previously reasoned in *Katchen v.*

Landry, 382 U.S. 323, 334, 86 S.Ct. 467, 475, 156 Ed. d. 391 (1966) that, "[T]he normal rules of res judicata and collateral estoppel apply to the decisions of bankruptcy courts". Therefore, although Petitioner is not barred from bringing another Motion to Remove Trustee before bankruptcy court in accordance with case jurisprudence mentioned above, he full well realizes that such new motion would have to be well grounded in new facts of trustee misconduct, and therefore new violations of Section 704. To date, Petitioner states trustee has not committed new acts of misconduct and may very well not in the future. Petitioner therefore reasons and avers he must timely appeal instant bankruptcy court denial to remove trustee or pursuant to res judicata and preclusive effect thereof he will be barred from appealing such final judgment at the closure of the bankruptcy case.

The Fourth Circuit prior and subsequent to *Turchen* has consistently discussed and held the principles and opinions of *Turchen* to be valid. Prior to *Turchen* in case *In Re Sumy v. Schlossberg* 777 F.2d 921 (4th Cir. 1985) the Fourth first set forth the principle that finality under 28 U.S.C. Section 158"...must be interpreted in light of the special circumstances of bankruptcy cases". Id at 923. In reaching the opinion of *Sumy* the Fourth relied upon and cited *In re Saco Local Development Corp.*, 711 F.2d 441, 444 (1st Cir. 1983) in which First Circuit stated that most adversary or contested matters in bankruptcy satisfy the test of being "discrete disputes within the larger case" (quoting *Saco)* or a "proceeding arising in or related to a case under Title 11", (quoting Levin, *Bankruptcy Appeals*, 58 N.C.L. Rev. 967, 987 (1980)), *Sumy* at page 923. The opinion set forth in *Saco* and *Bankruptcy Appeals* by Levin is that a bankruptcy proceeding adjudicating a single "judicial unit" arising in the larger

bankruptcy case are discrete judicial units which when adjudicated on the merits in bankruptcy court become final, appealable and immediately reviewable judgments under Section 158(a)(d). This single "judicial unit" measure of finality will be more fully discussed later under the distinguishing cases of the Fifth Circuit. In perfect harmony with *Turchen* the Fourth subsequently upheld in 1990 the principle of finality of a single "judicial unit" and res judicata of the decisions on said "judicial units" within the larger bankruptcy case. *Dept. Of Air Force v. Carolina Parachute Corp.*, 907 F.2d 1469 (4th Cir. 1990). Subsequent to *Dept. Of Air Force supra* the Fourth most recently in *In re Varant Enterprises, Inc.*, 81 F.3d 1310 (4th Cir. 1996) more fully discussed, Id at 1315, applying res judicata "in the bankruptcy context" citing *Brown v. Felsen*, 442 U.S. 127, 132, 99 S.Ct. 2205, 2209 (1979) as guiding. The *Varant* Court restated previous Supreme Court opinion that res judicata "doctrine encompasses two concepts: claim preclusion and issue preclusion, or collateral estoppel. *Allen v. McCurry*, 449 U.S. at 94, 101 S.Ct. at 414". *Varant* additionally set forth three conditions which must be met for claim preclusions to occur; (1) a final judgment on merits; (2) identical parties in both actions, and (3) claims in second action are based upon same causes of action involved in earlier proceeding. Applying these three conditions to instant case, Petitioner therefore avers that if trustee Traina does not commit further acts of misconduct he will be precluded under res judicata and claim preclusion from filing any additional Motions to Remove Trustee Traina; and therefore the appellate review of his instant case is appropriate and necessary.

The First and Third Circuits both have additionally authored guiding case jurisprudence supporting the finality and immediate appellate review of bankruptcy decisions on "judicial units" of dispute and the res judicata consequences of such decisions if they are not timely appealed. Honorable Judge Breyer of the First Circuit in *In Re Saco Development Corp.*, 711 F.2d 441 (1st Cir. 1983) discusses and chronologically traces throughout history of bankruptcy legislation the longstanding judicial interpretation that courts have viewed a "proceeding" within a bankruptcy case as a "judicial unit" for purposes of finality and appealability to higher courts. Id at 442-446. Judge Breyer and *Saco* court also stated at page 444:

> "More significantly for present purposes, Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the legal case"

Recently the First in *In re Belmont Realty Corp.*, 11 F.3d 1092 (1st Cir. 1993) citing *Katchen v. Landry*, 382 U.S. 323, 334, 86 S.Ct. 467, 475 and *Turchen* supra upheld and affirmed principle that all bankruptcy final decisions are subject to res judicata and claim preclusion. *Belmont* at 1095-1097. The Third Circuit also in *F/S Airlease II, Inc. v. Simon*, 844 F.2d 99 (3rd Cir. 1988) citing a previous case *In re Amatex Corp.*, 755 F.2d 1034, 1039 (3rd Cir. 1985) stated:

> The unique characteristics of bankruptcy case have led us to "consistently consider finality in a new pragmatic and less technical way in bankruptcy cases than in other situations." *In re Amatex Corp.*, 755 F.2d 1034, 1039 (3rd Cir. 1985)

The *Amatex* court had recognized and also cited the wisdom of First Circuit Judge Breyer in *In re Saco, supra* and *In re Leimer*, 724 F.2d 744, 745 (8th Cir. 1984) as case jurisprudence noting the longstanding Congressional and judicial liberal policy of finality and appealability of decisions in bankruptcy proceedings, *Amatex* at page 1039.

The Eighth Circuit as previously cited above, also shares the liberal point of view of the finality of all bankruptcy judgments on "judicial units". *In Leimer, supra* case the Eighth had to consider if a bankruptcy refusal to grant relief from stay was a final appealable judgment. Although it is commonly known that a motion for relief from stay can be raised a multitude of times in any bankruptcy case, the *Leimer* court stated such judgment was upon a separate dispute and "in bankruptcy proceedings, courts take a more liberal view of what constitutes a separate dispute for purposes of appeal." Id page 744. The Eighth in *Leimer* reaffirmed Judge Breyer congent analysis in *Saco, supra* of what constitutes a separate dispute or "judicial unit" for purposes of a final judgment and appeal. Recently in *In Re Apex Oil Co.*, 884 F.2d 343 (8thCir. 1989) the Eighth had to decide their jurisdiction, just as the Fifth Circuit had faced in Petitioner's appeal, and whether a lower bankruptcy court decision was final and appealable. To help it decide finality the *Apex* court applied a three (3) factor rule: (1) order leaves nothing to do but execute order; (2) delay in obtaining review would prevent aggrieved party from obtaining relief, and (3) later reversal on that issue would require recommencement of the entire proceeding. *Id supra* at page 347. Petitioner avers that utilizing this three (3) factor approach he respectfully avers that; (1) Bankruptcy Judge Thomas Brahney's denial of this removal motion did not leave any

issues unresolved except execution and entry of judgment; (2) that bankruptcy denial judgment prevented Petitioner from removing trustee and stopping her fiduciary malfeasance and ongoing depletion of debtor's bankruptcy estate, and (3) if later trustee Traina if found to have been judiciary negligent and removed, all other orders of the entire bankruptcy prior to her removal may have to be vacated, a new trustee appointed and bankruptcy recommenced, as did happen *In the Matter of Freeport Italian Bakery, supra.*

Finally, the Sixth Circuit in *In re Cottrell,* 876 F.2d 540 (6thCir. 1989) seems to agree with the Third Circuit's liberal view of finality in bankruptcy by citing *Amatex supra* and stating that the "concept of 'finality' in the bankruptcy context for purposes of appellate review to both district court and court of appeals 'should be viewed functionally' and 'in this regard have consistently considered finality in a more pragmatic and less technical way in bankruptcy cases than in other situations'. *Amatex* at 1039. As such, the Sixth proceeded to immediately review the single "judicial unit", namely the assignability of a single asset of debtor, Cottrell, of her bankruptcy estate, before debtor's discharge and closure of her bankruptcy case. Petitioner respectfully avers the Honorable Fifth Circuit having themselves previously recognizing the single "judicial unit" concept in regard to finality and appealability in bankruptcy should have similarly adjudged that Petitioner's denied Motion to Remove Trustee was a final, appealable decision on a "judicial unit" within the larger bankruptcy case.

FIFTH CIRCUIT SEEMS INTERNALLY SPLIT OVER WHAT CONSTITUTES A FINAL, APPEALABLE BANKRUPTCY DECISION

The Fifth Circuit panel (Honorable Judges, Wiener, Barksdale and Garza) which affirmed U.S. District Court's opinion that denial of Petitioner's removal motion was interlocutory and unappealable, seems not only to be in conflict with most other Appellate Circuits; but also in conflict with a majority of their colleagues on other Fifth Circuit panels which have previously established and expressed a liberal view of the finality and appealability of bankruptcy decisions deciding "judicial units". In contrast, the Fifth Circuit panel held in *In re Moody* (Smith v. Revie) 817 F.2d 365, 368 (5th Cir. 1987), held that "a bankruptcy proceeding is over when an order has been entered that ends a discrete judicial unit in the larger case". Id at 368. Additionally, a Fifth Circuit panel in *In re Louisiana World Exposition, Inc.*, 832 F.2d 1391 (5th Cir. 1987) stated at page 1396 the Fifth Circuit follows a leading treatise which states "each adversary proceeding [and contested matter] should be considered a separate judicial unit for purposes of determining finality". *1 Collier on Bankruptcy* 3.03, at 3-157 (L. King 15th ed 1987). The *Louisiana World Exposition* court reiterating in their opinion that the Fifth Circuit shares the liberal view of finality and appealability of bankruptcy orders cited several similar guiding cases in other appellate circuits, including *Moody supra*, (5th 1987), *Saco supra*, (1st Cir. 1983), *Sumy supra* (4th Cir. 1985). Id at page 1396. Most recently a Fifth Circuit panel (Honorable Judges Polity, Johnson and Jolly) in *Matter of England*, 975 F.2d 1168 (5thCir. 1992) opinioned that the Supreme Court has not defined final judgment with respect to 28 U.S.C. Section 158,

the jurisdictional provision added by the 1984 Amendments to the Bankruptcy Act of 1978 which supercedes 28 U.S.C. Section 1291. However, the panel held that a majority of the appellate circuits "view finality in bankruptcy proceeding in a more practical and less technical light". Id at page 1171. Again, in support of this opinion the *England* panel cited the same cases which *Louisiana World Exposition* panel previously cited, but additionally cited *F/S Airlease supra (3rd Cir. 1988); Cottrell; supra (6th Cir. 1989); Apex supra (8th Cir. 1989); Charter supra (11th Cir. 1985);* and *In re Brayshaw*, 912 F.2d 1255, 1256 (10th Cir. 1990). The *England* panel then proceeded to discuss and review the lower bankruptcy court judgment on issue of homestead exemption of debtor England.

The panel which presided over Petitioner's appeal in formulating and affirming District Court's opinion that bankruptcy court's judgment was interlocutory cited two cases, *In re Greene County Hospital*, 835 F2d (5th Cir. 1988) at 595 which quoted the statement, "a final order must 'conclusively determine substantive rights'" made in a previous Fifth case, *In re Delta Services Industries*, 728 F.2d 1267, 1271 (5th Cir. 1986). Neither case involves the finality of a Motion to Remove Trustee and the *Greene* court actually observed that to be appealable an order must be final with respect to a "single jurisdictional unit". Id at 592.

The panel then stated in argument their written opinion that Petitioner's motion was denied without prejudice, which is self evident, but then the panel stated, "there continues to be substantive proceedings in the bankruptcy court". Petitioner vigorously denies that there are any further substantive proceedings remaining for bankruptcy court to decide in his Motion to Remove Trustee proceeding

which he avers is a separate "judicial unit" and whose merits were heard in toto on February 13, 1997, as the judgment reflects. Petitioner, however, respectfully avers there does remain many more proceedings and other judicial matters to be decided in the larger case - namely the Bankruptcy Chapter 7 Case No. 91-14743 which has been pending for over seven (7) years (i.e. actually one of the several grounds of trustee misconduct contained in his removal motion).

The Respondent will probably argue that Bankruptcy Judge Brahney in reply to Petitioner's state of disappointment at the removal hearing stated to Petitioner he could possibly bring another Motion to Remove Trustee in the future (i.e. on a new set of facts). Petitioner argues that Judge Brahney's consoling statement was only of an informative nature to Petitioner, who was in Pro Se, and said statement did not mean, nor should it be construed, that he, Brahney, had not reached a complete substantive judgment on all the merits of Petitioner's removal motion (see Judgment - Appendix D). Petitioner previously cited appellate case jurisprudence, *In re Leimer*, 724 F.2d 744 (8th Cir. 1984), where a bankruptcy court's denial for Lift of Stay was treated as a final appealable judgment, even though it is universally accepted in bankruptcy law that a Motion to Lift Stay can be brought at any time and as often as a creditor deems changing financial circumstances and equity in estate property dictate. Petitioner similarity avers that the right to bring multiple Motions to Remove Trustee each on a separate and distinct set of facts and grounds, does not result in the conclusion that judgment on the first Motion to Remove Trustee, which represents a single "judicial unit" is therefore interlocutory and unreviewable. Additionally, such a statement made by a bankruptcy judge should not be construed in such a way as to

mean his instant final judgment is interlocutory to prevent or protect the judge's instant decision and opinion from higher appellate review. For the principle of appellate review of all final judgments is a judicial safeguard to protect the citizens of the United States from all judicial indiscretions and inherently unfair judgments.

FIFTH CIRCUIT'S OPINION IS CONTRARY TO THE PUBLIC SAFEGUARDS OF BANKRUPTCY LAW

The Congress of the United States in 1978 and 1984 realizing that Bankruptcy Court judges were having too much influence over the administrative direction of the bankruptcy proceedings and prejudicial influence over the trustees, instituted law which established that the total responsibility of administration and control of each bankruptcy case rested with each trustee. Thus, the trustee in addition to having administrative authority has fiduciary power to control, protect and distribute assets of a bankruptcy estate. Petitioner has presented numerous cases illustrating the majority of appellate circuits consider the importance of reviewing bankruptcy decisions on single judicial units of dispute, particularly those disputes concerning the assets of the estate (see quote from *In Matter of Kilgus, supra).* Petitioner in argument rhetorically asks what would constitute a more important dispute than a contested matter, namely a Motion to Remove Trustee, over alleged trustee's financial mismanagement of bankruptcy estate?

To temper the power and possible misconduct of trustees, Congress legislated Title 11, Section 324, permitting a trustee to be removed for cause. Congress intentionally did

not enact a time limit as to when said motion could or could not be brought, nor how many times said motion could be filed. For an appellate court to opinion that a judgment on a Motion to Remove Trustee is interlocutory is in effect stating that creditors and/or debtor must wait until closure of the bankruptcy case for appellate review; regardless of the existence of trustee misconduct, mismanagement, fraud and other violations of 11 U.S.C. Section 704 and possibly the resultant loss of an entire bankruptcy estate. Such was not the intent of Congress when they legislated Section 324 and 704 to safeguard the general public's well being in bankruptcy court from trustee misconduct.

CONCLUSION

Petitioner respectfully prays that for all of the aforementioned reasons that his Application for Writ of Certiorari should be granted and denial judgment of his Motion for Removal of Trustee be remanded for proper appellate review in U.S. District Court for the Eastern District of Louisiana.

Don C. Frusard

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 97-30779
(Summary Calendar)

In The Matter of: JOANN L. ULMER, Debtor

DAN FRISARD, Appellant

versus

CYNTHIA LEE TRAINA, Appellee

Appeal from the United States District Court
For the Eastern District of Louisiana
(96-CV03804-F)

Before WIENER, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

This case arises out of the Chapter 7 bankruptcy proceedings of JoAnn Ulmer, in which Dan Frisard ("Frisard") is a creditor and Cynthia Traina ("Traina"), the bankruptcy trustee. Frisard is also a defendant in related

litigation brought by Traina in the bankruptcy court, and a defendant in Louisiana state court suit in which Traina is an intervenor.

Frisard's appeal arises from his Motion to Remove Trustee filed in the bankruptcy court. Following an evidentiary hearing, the bankruptcy court denied Frisard's motion without prejudice and stated that Frisard could refile his motion when it warranted. Frisard sought leave to appeal the bankruptcy court's order in the district court. See 28 U.S.C. 158(a) (3). The district court refused to grant Frisrd leave to appeal, holding that the bankruptcy court's decision was an interlocutory order and that Frisard presented no evidence warranting leave to appeal. *Id.*

Frisard appeals the bankruptcy court's denial of his Motion to Remove Trustee and the district court's holding that the bankruptcy court's order was interlocutory. Traina argues that this Court lacks jurisdiction to hear Frisard's appeal because it is from an interlocutory order in the bankruptcy court. *See In re Greene County Hosp.*, 835 F.2d 589, 591 (5th Cir. 1988) (holding that we do not have jurisdiction to review interlocutory orders from bankruptcy court). Frisard asserts two grounds for our jurisdiction: he argues (1) that the bankruptcy court's order is not collateral, and that as a final order, it is appealable to this Court; and (2) that a failure by this Court to review the bankruptcy court's denial of his Motion to Remove Trustee violates his due process rights. We disagree on both counts.

With regards to his due process claim, Frisard puts forth no case and makes no argument that he has a liberty or property interest in our review of an interlocutory order from the bankruptcy court. As for his first claim, the district court correctly found that the bankruptcy court's denial of Frisard's Motion to Remove Trustee was an interlocutory order. A final order is "one which ends the litigation...and leaves

nothing for the court to do but exercise the judgment." *Catlin v. United States*, 324 U.S. 229, 233, 65 S. Ct. 631, 633 (1945); *see also In re Greene County Hosp.*, 835 F.2d at 595 ("A final order must 'conclusively determine substantive rights.'") (quoting *In re Delta Services Industries*, 728 F.2d 1267, 1271 (5th Cir. 1986).

Frisard does not dispute that his motion was denied without prejudice and that there continues to be substantive proceedings in the bankruptcy court. In light of these facts, we agree with the district court that the bankruptcy court's order was interlocutory. This disposes of Frisard's claim; we have held that "[a] district court may, in its discretion, take jurisdiction over interlocutory appeals from the bankruptcy court, but we have no such discretion. We have jurisdiction over final orders." *See In re Greene County Hosp.*, 835 F.2d at 591; *cf. In re Aegis Specialty Marketing Inc.*, 68 F.3d 919, 921 (5th Cir. 1995) ("This court has stated that when a district court sitting as a court of appeals in bankruptcy remands a case to the bankruptcy court for significant further proceedings, the remand order is not 'final' and therefore not appealable under 158(d).") (quoting *In re Nichols*, 21 F.3d 690, 692j (5th Cir. 1994).

This Court lacks jurisdiction to entertain Frisard's appeal.

It is hereby DISMISSED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF DEBTOR CIVIL ACTION

JO ANN ULMER NO. 96-3804 and 97-01244

CHAPTER 7 NO. 91-14743 CONSOLIDATED APPEAL

SECTION "F"

FILED:_____ _____

DEPUTY CLERK

ORDER

Considering the Motion for Partial Rehearing filed by Appellant, Dan C. Frisard;

IT IS ORDERED that the Partial Rehearing filed by Appellant be held before Honorable Judge Martin Feldman at ___A.M./P.M. on the ___ day of _____, 199 at 500 Camp Street, New Orleans, Louisiana.

SIGNED this ___ day of _____, 199 .

Denied 6/23/97

_____

JUDGE

APPENDIX - B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF DEBTOR CIVIL ACTION

JO ANN ULMER NO. 96-3804 AND 97-01244

CHAPTER 7 NO. 91-14743 CONSOLIDATED APPEAL

SECTION "F"

ORDER AND REASONS

Before the Court is Dan Frisard's Motion to Leave to Appeal interlocutory orders of the bankruptcy judge who is presiding over a Chapter 7 case *In re Jo Ann Lacoste Ulmer*, bankruptcy number 91-14743. The motion is DENIED.

Background

Frisard is a creditor in this Chapter 7 bankruptcy estate, the assets of which he claims are being unnecessarily depleted by the trustee. Trustee Cynthia Traina, through her attorney, Claude Lightfoot, has initiated litigation which Frisard claims is without merit and a waste of estate funds. Apparently, Frisard is a defendant in at least one of the suits filed.

Frisard takes issue with this litigation and expenditure of estate assets. He challenged the trustee by objecting to payments of attorney's fees and by seeking to remove the trustee. The bankruptcy court denied both challenges.

Law and Application

Both orders are interlocutory. Appeal may only be filed by leave of court, 28 U.S.C. 158 (a) (3), which this Court denies.

An interim fee application is interlocutory and non-appealable. *In re Cluck*, 101 F.3d 1081, 1082 (5th Cir. 1996). Frisard's Motion to Remove Trustee was denied without prejudice. The bankruptcy court said on the record that Frisard could re-urge his motion if the suits are ever dismissed as frivolous.

The Court will not exercise its discretion to review these interlocutory orders. Whether to review the interlocutory order of a bankruptcy order is left largely to the discretion of the district judge, and is generally disfavored. *In re Executive Office Ctrs., Inc.*, 75 B.R. 60 (E.D. la. 1987).

Frisard has failed to establish that there is cause to appeal these interlocutory orders. Frisard states only legal conclusions, and fails to support his contention that the bankruptcy court erred. He has not shown that the bankruptcy court acted arbitrarily or capriciously, or abused its discretion. Id.

Frisard contends that he will suffer irreparable harm should the Court not review what he sees as substantial questions of law presented in his appeal. Frisard's attempt to establish irreparable harm does not rise above the level of speculation, and is not persuasive in light of the fact that the fees question will be revisited upon submission of the final fee application. Similarly, there is no substantial inquiry of law here, but only questions of fact or mundane questions fact and settled law. There is no reason to disrupt the bankruptcy court's management of this case. Appeal is premature and Frisard's Motion to Leave is DENIED.

New Orleans, Louisiana, May 29, 1997.

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF LOUISIANA

MINUTE ENTRY
BRAHNEY, J.
FEBRUARY 13, 1997

IN THE MATTER OF	NUMBER
JO ANN LACOSTA ULMER	9114743
	SECTION "A"
DEBTOR(S)	CHAPTER 7

This matter came before the Court this date on the Motion to Remove Trustee (p. 145) filed by DAN C. FRISARD, creditor.

PRESENT: DAN C. FRISARD, Mover
CLAUDE C. LIGHTFOOT, JR.
Counsel for Cynthia L. Traina, Trustee
CYNTHIA L. TRAINA, Witness

The trustee filed a memorandum in opposition to said motion.

After hearing testimony from the trustee, and statements of Mr. Frisard and counsel for the trustee, and for reasons orally stated in Court;

IT IS ORDERED that the Motion to Remove Trustee filed by creditor Dan C. Frisard, be, and is hereby **DENIED**.

New Orleans, Louisiana, February 13, 1997.

T.M. BRAHNEY, III
U.S. BANKRUPTCY COURT

APPENDIX - D

§ 324. Removal of trustee or examiner

(a) The court, after notice and a hearing, may remove a trustee, other than the United States trustee, or an examiner, for cause.

(b) Whenever the court removes a trustee or examiner under subsection (a) in a case under this title, such trustee or examiner shall thereby be removed in all other cases under this title in which such trustee or examiner is then serving unless the court orders otherwise.

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2562; Pub.L. 99-554, Title II, § 208, Oct. 27, 1986, 100 Stat. 3098.)

§ 704. Duties of trustee

The trustee shall—

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;

(2) be accountable for all property received;

(3) ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title;

(4) investigate the financial affairs of the debtor;

(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;

(6) if advisable, oppose the discharge of the debtor;

(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;

(8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires; and

(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee.

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2605; Pub.L. 98-353, Title III, §§ 311(a), 474, July 10, 1984, 98 Stat. 355, 381; Pub.L. 99-554, Title II, § 217, Oct. 27, 1986, 100 Stat. 3100.)